United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2694

ORIGINAL

To be argued by
THOMAS H. HEALEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

FRANCIS X. DONOVAN,

Plaintiff-Appellant,

vs.

PENN SHIPPING CO., INC., and
PENN TRANS CO., INC.,

Defendants-Appellees.

**On Appeal From The United States District Court
For The Southern District of New York**

DEFENDANTS-APPELLEES' BRIEF

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Statement

This appeal arises out of a seaman's Jones Act claim for damages. The matter was tried to a jury before the Honorable Murray I. Gurfein on February 20, 21, and 22, 1974. A verdict for $90,000.00 was returned. Upon defendant's post-trial motion Judge Gurfein in a detailed and well reasoned opinion and Order, dated August 6, 1974 granted a new trial having found that the damages were so excessive so as to shock the conscience of the

court. Following the accepted district court practice he granted the plaintiff the option of avoiding a new trial and obtaining judgment if he would remit $25,000.00 and accept a verdict of $65,000.00. Judge Gurfein specifically found that $65,000.00 was the maximum which any jury could reasonably have granted.

The plaintiff has never unconditionally agreed to Judge Gurfein's Order. He sought to have Judge Gurfein certify the Order for appeal which request Judge Gurfein refused. After Judge Gurfein's elevation to this Court the matter was re-assigned to Honorable Henry F. Werker. Finally, on August 6, 1975 plaintiff's ex parte Order was signed by Judge Werker. This judgment read in part:

> "the plaintiff having waived his right to a new trial and accepted the remittitur under protest without prejudice to his right to appeal therefrom, it is hereby
>
> ORDERED, ADJUDGED and DECREED that plaintiff have judgment against the defendants in the sum of $65,000.00 together with interest thereon from 22nd day of February, 1974."

In submitting the judgment ex parte plaintiff concealed from the defendant his acceptance of remittitur "under protest" and that he awarded himself, contrary to law, interest prior to judgment from the date of the non-existent verdict which Judge Gurfein had struck down.

Plaintiff would now have this Court accept the minority procedure of the 5th Circuit and sanction conditional acceptance of remittitur. Plaintiff's brief treats this fundamental question as already decided in his favor and devotes the bulk of his brief to rearguing the question of damages and seeking to sustain his overreaching grant of prejudgment interest.

POINT I

The grant of a new trial whether total or limited to the issue of damages, whether absolute or partly conditional by remittitur, is an unappealable order and the rubric "under protest" cannot and should not create an appealable order.

The true issue is whether it is desirable to overturn the almost unanimous doctrine of the non-appealability of a trial court's grant of a new jury trial based upon its discretionary judgment that the original verdict is shockingly improper.

This issue is concealed by treating the inclusion of a remittitur option as having independent validity apart from the trial court's common law, and statutory (Rule 59 FRCP) *duty* to grant new trials.

Where a purported verdict is so beyond reason that it is "self-destructive", it must be treated as a nullity. Simply put, a new trial must be had since the first aborted. There is nothing to appeal. Remittitur is a pragmatic tool to "pressure" the parties into stipulating to substitute a court formulated "verdict" and so gain finality and end litigation, including appeal.

In theory it favors neither litigant since a "fair verdict" is court formulated. In practice it favors the plaintiff, who having obtained a tainted verdict and facing retrial, now has an option to save his verdict. Therefore, the acceptance of the remittitur "under protest" is a perversion of the intent and inequitable to defendant. Plaintiff entitled to nothing, is given something by the trial court, but demands more.

Defendant submits that the basic question in determining the appealability of these matters requires an exam-

ination of the essence of the judicial right to grant new trials, and not a statistical expedient as suggested by Reinertsen.

A) The right and duty to grant a new trial when the verdict is improper is historically the inherent discretionary power of the trial court.

Generally the Federal District Courts have original trial jurisdiction, while the Circuit Courts have appellate jurisdiction from *final* operations of the district. The trial court is spoken of as inferior, in that it is the litigant's first step, not that it is intellectually or morally suspect or unable to perform its proper function. The District Court is not the retarded ward of the Appellate Court.

The Federal Trial Court has the inherent right to "reconsider the cause by a new trial". This historic principle gives ". . . to the Federal trial judge . . . ample power to see that justice is done in cases pending before him; *and the responsibility attendant upon such power is his in full measure.*"

> *Aetna Casualty & Surety Co.* v. *Yeatts,* 122 F. 2d 350

Wright and Miller, Federal Practice and Procedure, 2801 et seq. stress that the Federal trial judge has the right and duty to set aside tainted verdicts.

This circuit has always recognized this as the obligation of the district court, and its to discharge according to its good conscience. There is a subjective note here, recognized in many decisions.

Taylor v. *Washington Terminal Co.,* 409 F2 145 cert. den. 396 US 835 recognized:

> "The deference due the trial judge who has had the opportunity to observe the witnesses and consider the evidence in the context of a living trial rather than upon a cold record."

In *Alexander* v. *Nash Kelvinator,* 261 F.2d 187, 191 (2 Cir. 1958) the court said:

> "This court is mindful of the principle so frequently reiterated that the question of the excessiveness of a jury verdict is to be determined by the *trial court* on a motion for a new trial. *In such cases the trial court, in effect, occupies the position of a reviewing judge. He has the power to pass upon, set aside or even reduce by remittitur excessive awards.* * * *" (Italics ours)

In *Dellaripa* v. *New York, New Haven and Hartford Railroad Company,* 2 Cir., 1958, 257 F.2d 733, 735 the court held:

> "* * * the trial court has the power to set aside the jury's verdict if he believes that it is excessive, but obviously that power must be exercised with due regard for the jury's primary responsibility to fix the amount of the damages. However, responsibility for the amount of damages awarded does not lie exclusively with the jury—its responsibility is primary, but not final. The *ultimate responsibility rests with the trial judge* who may set a verdict aside. His power to set aside a verdict as excessive implies that he has a duty to do so when he conscientiously believes that the jury has exceeded the bounds of propriety. This duty should not be avoided by hiding behind the jury's verdict. * * *"

See also *Fiskratti* v. *Pennsylvania Railroad Co.*, D.C.S.D. N.Y. 1957, 147 F.Supp. 765.

When the sum agreed upon by the jury is so vastly at variance with what common sense and experience dictate to be a fair allowance in the particular circumstances of the case, courts have not hesitated to exercise their discretionary power to modify the verdict in the interest of fairness to all parties. *Burris* v. *American Chicle Co.*, D.C.E.D.N.Y. 1940, 33 F.Supp. 104, affirmed 2 Cir., 1941, 121 F.2d 218; *Cunningham* v. *Pennsylvania R. Co.*, 55 F. Sup. 1012.

Clearly the review of jury verdicts is a discretionary power peculiar to the district trial judge (he has viewed and experienced the happening, as a general proposition his ability and uprightness cannot be questioned.) The appellate judge cannot intrude here, save for an abuse of discretion.

> 6A Moores Federal Practice No. 59.15(1);
> *Cosentino* v. *Royal Netherlands S.S. Co.*, 389 F. 2d 726 (2 Cir. 1968);
> *Compagnie Nationale Air France* v. *Port of N.Y. Authority*, 427 F. 2d 951 (2 Cir. 1970);
> *Bigart* v. *Goodyear*, 361 F. 2d 317 (2 Cir. 1966).

The grant of a new trial because of excessive damage award is merely a special application of the general power of the court to grant new trials, and as such is not appealable.

> Wright & Miller, Federal Practice & Procedure 2807.

Remittitur is a variation on the grant of a new trial established by *stare decisis* (*Blunt* v. *Little*, 3 Fed. Cas. 760 No. 1578 and subsequent Supreme Court cases) which

presents the plaintiff with the option of submitting to a new trial or accepting the amount of damages which the court determines.

The grant of a new trial with the condition of a remittitur has not changed the nature of the remedy, it still is a basic, inherent, discretionary duty of the trial court. When the trial court has so discharged its conscience, the law should not belittle the action, by fudging it with the caveat "under protest" so that the Court of Appeals can act as the district court's super-conscience. Either such power of review is an inherent personal responsibility of the trial court, or it is nothing. The Court and litigants must recognize it as such, accept it absolutely or reject it.

B) The 5th Circuit allows appeals from remittiturs accepted under protest but the reasoning is erroneous and the result not desirable.

The policy of the Fifth Circuit is allowing the acceptance of a remittitur "under protest" is completely unique to that Court. The Rule has, at best, a dubious beginning.

The "leading" case citing this practice is *Delta Engineering Corp.* v. *Scott*, 322 F. 2d 11. In this five-sided appeal, the Court never ruled on the issue of whether an appeal of the order of remittitur could be made. Justice Brown, writing for the Court clearly states this:

> "Scott seeks to set aside the remittitur and reinstate the judgment at $98,200. All defendants within the risk of judgment oppose this on two grounds. The first is that voluntary acquiescence in the remittitur forecloses further review . . . We need not pass expressly on the first. We would assume, without deciding, that until such time as plaintiff has actually obtained the fruits of such judgment,

> (which is not the case here) he is free to challenge the legal correctness of the Court enforced remittitur."

Where the issue of the effect of acceptance of remittitur on appeal was squarely before the court, the 5th Circuit rules that acceptance barred appeal.

> *Movible Offshore* v. *Ousley,* 346 F. 2d 870;
> *Minerals & Chem. Phillip* v. *Micwhite,* 414 F. 2d 428.

(The remittitur was not made under protest in these cases).

However, in *Steinberg* v. *Indemnity Ins. Co.,* 364 F. 2d 266, the 5th Circuit set forth facts to establish that the trial judge had seriously abused his discretion and so it allowed the appeal after acceptance of remittitur under protest and then they reversed the trial judge. It is suggested that hard cases make bad law.

U. S. v. *1160.96 Acres,* 432 F. 2d 910, also is an extreme factual situation. The Government was held to be the "pursuer" of the private citizen in a condemnation proceeding. The citizen was being forced to sell and so, under these unique facts, "there was nothing free about this acceptance".

In another extreme factual case (verdict of $1,380,000 which was reduced to $690,633 by application of legally improper standard) *Gorsalitz* v. *Olin Mathieson Chemical Corp.,* 429 F. 2d 1033 the appeal was allowed from the acceptance of the remittitur under protest, but the point was not discussed by the court.

Professor Moore's comments on the 5th Circuit doctrine show its impracticality and infer the author's disapproval. (See Sec. 59.05(3) of Moore's Text, set out in part below.)

C) *Reinertsen* v. *George W. Rodgers*, 519 F. 2d 531 (2 Cir. 75) is not authority for allowing acceptance of remittitur under protest.

Reinertsen merely raised the question whether the 5th Circuit practice should be accepted into the 2nd Circuit. We submit the above argument makes clear that "remittitur under protest" is a legally confused concept.

Point 4 of plaintiff's brief is amazing in suggesting to this Court that *Reinertsen* has accepted the procedure of the 5th Circuit and so "this case is ripe for review". Plaintiff offers neither analysis nor argument as to why the 5th Circuit practice should be accepted here and so begs the question. The analysis above demonstrates that the 5th Circuit procedure is legally unacceptable.

1) The review of the 5th Circuit cases shows that their doctrine arose out of the necessity of a few hard cases rather than from a well reasoned analysis.

2) The law in every other Circuit including the 2nd Circuit and in the Supreme Court is opposed to the 5th Circuit aberation. 6th Circuit has looked to state law to determine whether remittitur under protest would be accepted and as Wright and Miller point out in their text of Federal Practice:

> "the grant or denial of a new trial is a matter of procedure governed by these rules and not by state law or practice".

3) An analysis of the power to grant new trials, with or without remittitur, involves an element subjective to the District Court including the personal presence of the trial Judge at a "living trial", and so, by its nature should not be readily reviewable on appeal.

This Court in Reinertsen voiced curiousity as to the pragmatic effects that might follow an endorsement of

the conditional acceptance of a remittitur. The Court asked would it increase the judicial workload.

First of all, while defendant has discovered no statistical index on the question, the Court is referred again to *Wright & Miller Federal Practice*, Section 2803 where the authors say:

> "from the reported cases it does not appear that in more than about one case a year a new trial is granted and the Appellate Court ultimately reinstates the verdict at the first trial. This seems not an excessive price to pay for the advantages in having the trial court exercise its considered judgment in passing on the motion for a new trial."

If the plaintiff were not allowed to weasel word his acceptance, he must accept the remittitur or a new trial. The limited experience of defendant's counsel indicates that the overwhelming majority of remittitur are complied with and litigation ended. Would this practice of acceptance under protest increase the judicial workload? On the evidence of the three cases where the "under protest" device has been invoked in this Court, the expenditure of judicial manpower is appalling. The Reinertsen case, as already noted, was reviewed by District Judge Frankel when it finally wound down to a conclusion, and he noted that it had been "morbidly" prolonged. Reinertsen involved two trials at the District Court level, motions for reargument by plaintiff, maneuvering by plaintiff to accept under protest, a petition of mandamus, an appeal and a return to the District Court where the plaintiff was again denied because of overreaching on the question of interest.

In the present case there has been a trial, reargument, attempt at certification of an appeal, improper submission of an Order for interest with resultant motions and

now this appeal. Contrary to the oversimplification which the 5th Circuit suggests its practice leads to, this Court has experience substantial litigation.

> See *Evans* v. *Calmar* 75-7456 (currently pending before this Court).

An analysis by Professor Moore of the 5th Circuit case of *U. S.* v. *1160.96 Acres*, demonstrates the complexity of the matter. There are two issues interwoven: has there been an abuse of discretion in the grant of a new trial, and is the size of the remittitur correct? Two different standards are applicable. The abuse of discretion cannot be measured by any hard standards since it is "discretionary". That the Circuit Court might have done it differently is insufficient grounds to touch the discretionary grants of a new trial. Theoretically the remitted amount is subject to legal standards. The appeal under protest could well result in a judicial waste of time if the remittitur is faulty, and the discretionary grant of a new trial correct. The lengthy review (below) from Professor Moore reveals that this is just what has occurred in the 5th Circuit case.

> "In *Delta Engineering Corp.* v. *Scott*, the Fifth Circuit read the Supreme Court cases as predicated on a free will decision to accept a certain amount in lieu of the uncertainties of a new trial, and held that when the agreement to the remittitur is made under protest, the plaintiff may appeal to test the legality of the conditional order. It is to be noted, however, that in the Fifth Circuit it is held that remittitur is legal only when the verdict is in excess of the maximum amount that the jury could reasonably find, while the decision of the trial court in granting a new trial is reviewable only for abuse of discretion. Thus unless such abuse can be shown, the appeal is likely to result in a new trial, which, of course, the plaintiff could have had in the first place by simply refusing to agree to the remittitur.

United States v. *1160.69 Acres of Land, Holmes County, Mississippi* (CA5th, 1970) 432 F2d 910, 14 FR Serv2d 793, is an example of the possible waste of time produced by such appeals. There the jury in a condemnation case brought in a verdict below the highest figure testified to by the landowners' experts and above that testified to by the government's experts. The government moved for a new trial, or as an alternative an order of remittitur of a stated amount. The trial court ordered a new trial or remittitur of a lesser amount. The landowner accepted the remittitur with a reservation of the right to appeal if the government appealed. The government did appeal and the landowner cross-appealed. The government's appeal was dismissed for failure to prosecute and it then moved to dismiss the cross-appeal. The court of appeals denied the motion and heard the case on the merits, holding that under the highest legal verdict standard the remittitur order was improper. It went on to hold, however, that since the standard for the granting of a new trial was to be measured by abuse of discretion the cause was to be remanded to the district court to give it an opportunity to rule upon the motion for a new trial uncluttered by the remittitur question. Unless the court of appeals proceeded upon the improbable assumption that the district judge read the standard for a new trial order conditioned upon remittitur as permitting such an order when an order for a new trial would be an abuse of his discretion, the disposition of the appeal left the landowner in the unfortunate position of arguing an appeal to achieve an end that he could have achieved without the time and expense of appeal by simply refusing to agree to the remittitur in the first place. It appears, then, that

> in a jurisdiction in which the standard for a new trial on the ground of excessive verdict is broader than the ground for remittitur, the right to appeal is chimerical unless the court of appeals will rule upon the propriety of the grant of a new trial or decrease the remittitur amount."
>
> Moore's Federal Practice, Vol. 6A, sec. 59.03(3) p. 59-63, 59-64.

The non-appealability of the Trial Court's remittitur was what made it an effective device at the trial level. One reason for the almost unanimous determination that it cannot and need not be immediately reviewed on appeal, is the trust in the integrity and competence of the District Judges. If for no other reason then this statement of confidence in the trial bench, the 5th Circuit practice should be rejected.

POINT II

Interest cannot be awarded prior to August 5, 1975 and should equitably not precede November 21, 1975.

On August 5, 1974 trial ended without a valid verdict. The trial judge, exercising his discretion set it aside as excessive, but offered plaintiff the option of remittitur. Because of plaintiff's maneuvers and delays a "judgment" was not entered until August 5, 1975. This judgment, contrary to rule was done on an ex parte basis, with plaintiff awarding himself interest from August 4, *1974*.

It was not until November 21, 1975 that Judge Werker, on defendant's motion, amended the award of interest, making it run from August 6, 1975. A proper judgment, therefore, was not entered until November 21, 1975, all

because of wilful conduct of plaintiff. Examination of plaintiff's action demonstrates why interest should not commence until November 21, 1975.

First, the proposition is obvious that interest cannot precede the entry of judgment, though a gap exists between verdict or decision and judgment. See *Kotsopoulos* v. *Asturia*, 467 F. 2d 91. In this case the trial court's findings of fact were rendered on June 5, 1968, amended thereafter so that judgment was not entered until September 12, 1968. Plaintiff moved to amend the judgment to make it retro-active to June 5, 1968. This was denied.

On appeal this Court awarded interest from September 12, 1968 holding that Rule 37 compels interest "from the date of judgment". Inferentially, the ruling rejected plaintiff's argument that June 4, 1968 the "decision" date should control. By analogy this rules out the argument here that August 4, 1974 the "verdict" date should control.

In *Reinertsen* v. *Rodgers*, 403 F. Supp. 1263, Judge Frankel, dealing with the identical claim for pre-judgment interest presented here, denied plaintiff's claim and cited *Kotsopoulos* as authority.

Since Paul C. Matthews was counsel for *Kotsopoulos* and *Reinertsen* his submission of an ex parte judgment to Judge Werker awarding pre-judgment interest contrary to the law and his failure to call these authorities to this court's attention appears to be wilful over-advocacy. It caused the delay of effective judgment until November 21, 1975 and this date should be the effective date for commencing interest.

Counsel's conduct in delaying final judgment and in pursuing a claim for interest both here and in the district court can fairly be characterized as multiplying the proceedings ". . . unreasonably and vexatiously". Not only would this militate against awarding more than the mini-

mum interest, it is a legal basis for taxing costs against the attorney personally.

> See *Hanley* v. *Condrey*, 467 F. 2d 697 (2 Cir. 1972).

The cases cited by plaintiff are not at all to the point.

In *Louisiana & Arkansas* v. *Platt*, 142 F. 2d 847 the circuit court reversed the trial court entry of judgment n.o.v. for defendant and ordered interest from said reinstated verdict since "the date of the verdict and the date when judgment should have been entered are the same".

In *Swartzbaugh* v. *United States*, 289 F. 2d 81, the circuit court reduced the original judgment, but then held that interest was properly awarded on reduced amount from the day of judgment. It would seem that that is the very principle that defendant is urging upon this court, namely that interest cannot precede judgment.

Plaintiff's citation of the New York CPLR and authorities thereunder is completely out of order. This is a federal maritime action and both as a matter of federal procedure and maritime uniformity the reference is inappropriate.

Litwinowicz v. *Weyerhaeuser*, 185 F. Supp. 692, awarded interest from the judgment on a reduced amount involving the same principle as *Swartzbaugh* and so inappropriate.

Plaintiff cites *Briggs* v. *Pennsylvania*, 164 F. 2d 21, a case which concededly demonstrates that his position is improper and that interest cannot precede judgment. By somewhat obtuse argument he claims that the Supreme Court in *New York* v. *Fifth National Bank*, 118 U.S. 608, and *Quebec* v. *Merchant*, 133 U.S. 375, are contrary to the second circuit rule. Review of the two Supreme Court

cases reveals that the question involved was whether interest included in a judgment should be considered in determining whether the jurisdictional amount was presented. The issue before this court is not involved.

The flimsiness of plaintiff's authorities and his avoidance of the *Kotsopoulos* decison are indicative of the frivolousness of his argument.

POINT III

The trial court's determination that a new trial must be granted on the issue of damages, since the verdict was clearly excessive, was not an abuse of discretion and cannot be set aside as erroneous. The amount which the trial court decided must be remitted, $25,000.00, was, if anything, inadequate, and the remittitur should have been greater.

As demonstrated in Point I of this brief, the granting of a new trial cannot be reversed unless the reviewing court finds that the trial judge clearly abused his discretion.

Consideration must be given for the peculiar knowledge which the trial court possessed as participant in the "live trial". The fact that the circuit court might disagree or have done otherwise in the use of their discretion does not mean the trial court abused its.

An examination of Judge Gurfein's opinion shows that his discretion was exercised after a full and careful reflection on the facts involved and on the applicable law.

In his brief, plaintiff alludes to exhibit 10. Although Judge Gurfein does not rest his decision on exhibit 10, some consideration of this bit of evidence illustrates

plaintiff's overreaching. Only the trial judge participating in the actual situation could fully appreciate such matter. Exhibit 10, as the court can see, simply contains numbers with little explanation. It had been used in a prior trial by plaintiff's counsel and he had restricted its use to the simple numbers shown on the exhibit. It was introduced on plaintiff's motion into the present case with no amplifying proof. Yet, on summation, plaintiff's counsel, read into Exhibit 10 premium pay, overtime, anticipated increases into the future, etc. The trial judge's decision to deny a mistrial was tempered by his caution that if the jury was misled by unfounded speculations, he could review the verdict for excessiveness.

The plaintiff, Donovan, was a 54-year-old seaman. Most of his adult life had been spent at sea yet he sailed as an unlicensed able-bodied seaman. He suffered a colles' fracture of the wrist with some permanent disfigurement but was able to return to work as fit for duty within six months.

Ignoring the speculative flights of fancy plaintiff's counsel exhibits when foreseeing Donovan's future economic disintegration, it is submitted that an award of $90,000.00 for such injury is to an experienced trial judge so above the norm as to be unquestionably excessive.

Since the law is clear that the trial judge in exercising discretion has to be allowed reasonable latitude and since it is conceded that there is no exact or arithmetical damages, the reasonable approach is to examine Judge Gurfein's decision to determine whether he was in such bounds. Defendant, in good conscience, could argue for a further reduction but in candor must admit that Judge Gurfein's figure seems a fair discretionary assessment.

The argument of plaintiff's counsel, is based on the improper assumption that there is some absolute measure to effect damages and that he has found it.

Aside from such improper assumption, plaintiff's brief just plainly misstates facts.

Plaintiff (p. 8 brief) states he waived his right to a new trial on August 16, 1974. No where is this alleged "waiver" documented. In fact, plaintiff refused to clarify his position until August 6, 1975, when he prepared the ex parte acceptance "under protest."

At page 11, plaintiff now argues that his remarks were "in accord with the union agreements". But he admits the agreements were not in evidence, thereby conceding the impropriety of his reference to such contractual matters in summation.

At page 16, plaintiff alleges that defendant conceded *in his brief* $56,000 in special damages, plus general damage for pain and suffering of $15,000. (The inference is that defendant concedes $71,000 while Judge Gurfein awarded but $65,000). Since such misstatement is especially pernicious some refutation in detail is needed.

Plaintiff cites as authority "(brief, p. 7) (A-114)". One would assume the reference is to defendant's brief, where such admission would be found. But page 114 of the appendix is page 7 of *plaintiff's* memorandum for re-argument, and contains confused figures out of a rug merchant's dream. But it contains no "analysis" or "calculations" of defendant.

In defendant's own brief, at page 7 thereof (coincidence ??) is set out just what defendant would admit. This is at page 89 of the appendix.

Defendant conceded $6,000 in special damages, felt $10,000 to $15,000 was the maximum general damage—

pain and suffering award, and suggested future lost earnings could not exceed $30,000. That totals $46,000 to $51,000, for all damages.

Why plaintiff would rely upon inaccuracies rather than careful analysis, can best be understood if it is taken as an admission of weakness in attacking Judge Gurfein's award.

The court is referred to Judge Gurfein's carefully reasoned and detailed opinion. When it is contrasted with plaintiff's oracular prognostication of future total ruin, the solidity of Judge Gurfein's opinion clearly stands out.

Such speculation has been held improper.

> *Hoffman* v. *Sterling Drug Inc.*, 485 F. 2d 132 (3 Cir. 1973);
> *Bartkowiak* v. *St. Adalbert Roman Cath. Ch. Soc.*, 40 A.D. 2d 306, 340 N.Y.S. 2d 137.

CONCLUSION

The plaintiff's appeal insofar as it seeks review of the remittitur, should be dismissed on the grounds that such order is not final and not appealable.

The judgment below dated August 6th, 1975 must be amended to strike that portion which reads, "under protest without prejudice to his right to appeal," or alternatively, the matter must be set down for a new trial.

The order must be further amended to provide that interest shall commence running thereon from November 21, 1975.

An award of costs and disbursements should be granted to defendant since the within appeal was frivolous.

An award of attorney's fees to defendant from plaintiff's counsel should be granted since proceedings were willfully and vexatiously multiplied.

Respectfully submitted,

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THOMAS H. HEALEY
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Of Counsel

375—Affidavit of Service

United States Court of Appeals
for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Francis X. Donovan

Plaintiff-Appellant

vs.

Penn Shipping Co. Inc., and
Penn Transfer Co. Inc.,

Defendants-Appellees

On Appeal f rom the United States District Ciurt
for Southern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Bernard S. Greenberg Esq. agent for Darby Healy & Stonebridge being duly sworn, deposes and says that he is over the age of 21 years and resides at 11 Park Place New York, New York

That on the 5th. day of March 1976 at 11 Broadway New York, New York he served the annexed Brief upon Paul Matthews Esq. in this action, by delivering to and leaving with said attorney 3 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 5th. day of March 1976

Raymond J. Donaldson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977